UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC. CASE NO. 92-00860

Debtor Chapter 11

NIAGARA MOHAWK POWER CORPORATION

Plaintiff

vs. ADV. PRO. NO. 94-70113

MEGAN-RACINE ASSOCIATES, INC., and
THE FEDERAL DEPOSIT INSURANCE
CORPORATION, as RECEIVER FOR THE
NEW BANK OF NEW ENGLAND, N.A.

Defendants

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court on motions by Niagara Mohawk Power Corporation ("NIMO"), the Federal Deposit Insurance Corporation, as Receiver for the New Bank of New England, N.A. ("FDIC"), and Megan-Racine Associates, Inc. ("Debtor") in the adversary proceeding commenced by NIMO in August 1994, against Debtor and the FDIC. On or about March 5, 1996, NIMO filed a motion for partial summary judgment against Debtor and the FDIC

pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). On or about March 6, 1996, the FDIC filed a motion for summary judgment dismissing Count II of NIMO's complaint in the adversary proceeding, which is captioned "Declaratory Judgment Against the FDIC." Debtor filed a cross-motion for partial summary judgment against NIMO on or about March 20, 1996. Hudson Engineering, as *amicus curiae*, filed a memorandum of law in support of the motions by Debtor and the FDIC for partial summary judgment.

The Court heard oral argument on April 2, 1996, at a regular motion term in Utica, New York, and the matter was submitted for decision on that date. Determination of this matter was reserved, however, until final resolution of an appeal by NIMO of this Court's Order dated February 2, 1996. On December 17, 1996, the United States Court of Appeals for the Second Circuit affirmed this Court's Order, and the Court now addresses the above motions for summary judgment.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(B), (C), (H) and (O).

FACTS

Debtor was incorporated on March 31, 1987 for the purpose of developing and operating a gas-fired cogeneration facility ("Facility") in Canton, New York. On November 21, 1987,

Debtor entered into a Power Purchase Agreement ("PPA") with NIMO for the sale and purchase of electric power produced at the Facility. Debtor thereafter filed an Application for Commission Certification of Qualifying Status of a Cogeneration Facility with the Federal Energy and Regulatory Commission ("FERC"), and in January 1989, the FERC issued an order granting Debtor's application. The Facility commenced commercial operation in May 1991.

Construction financing for the Facility was originally provided by New Bank of New England ("BNE"). As collateral security for that financing, Debtor assigned the PPA to BNE. In August 1989, NIMO executed a consent in favor of BNE ("Consent"), in which NIMO acknowledged and consented to the assignment. Thereafter, in September 1989, Debtor and BNE entered into a credit agreement and appurtenant documents ("Loan") whereby BNE ultimately agreed to lend approximately $53.5 million dollars for construction of the Facility. The FDIC succeeded to and currently holds all right, title and interest formerly held by BNE in and to the Loan documents, including the PPA and the Consent.

On March 17, 1992, Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). NIMO commenced an adversary proceeding by filing a complaint on or about August 1, 1994. Trial of the matter was initially scheduled to commence in March 1995, however, prior to that date Debtor and the FDIC filed motions for summary judgment, or in the alternative, for a stay of the adversary proceeding pending resolution by the FERC of the issue of whether the Facility was a "qualifying facility" ("QF") within the meaning of paragraph FIRST of the PPA. This Court granted the requested stay and ordered the parties to return for a determination of the remaining issues after the FERC's resolution of the QF issues. In December 1995, the FERC issued an order determining that the Facility was not a QF during

calendar years 1991 through 1994.

The parties subsequently stipulated to a service date of March 4, 1996, for dispositive motions, including motions for summary judgment. The Court now addresses the parties' motions for partial summary judgment in this matter.

ARGUMENTS

NIMO argues that Debtor's failure to achieve QF status during the period from 1991 through 1994 renders the PPA null and void *ab initio*. According to NIMO, certification of the Facility as a QF was a necessary element of Debtor's obligations under the PPA, and since the certification originally granted to the Facility was conditional, Debtor's subsequent failure to achieve the operational requirements necessary for QF status rendered the conditional certification a "dead letter" from the very beginning. NIMO supports this argument by referring to a December 14, 1995, decision by the FERC, which found that Debtor had not complied with the QF requirements from 1991 to 1994, and that therefore the original certification could not be relied upon. NIMO also alleges that Debtor and the FDIC withheld knowledge of the problems the Facility was experiencing in meeting QF status.

Debtor argues that the loss of QF status for the years 1991-1994 does not provide a basis for NIMO to declare the PPA null and void. Debtor alleges that examination of the language of the PPA demonstrates that after the Facility initially complied with the three qualifications listed in paragraph FIRST of the PPA, the Facility would have to subsequently fail all of the qualifications before the PPA could be declared null and void. Debtor indicates that the PPA

does not base the grounds for declaring the agreement void on loss of "qualifying status," but rather on the loss of "such qualifications," and therefore loss of QF status alone is not sufficient to declare the agreement void. Debtor also disputes NIMO's claim that it intentionally concealed the problems faced by the Facility in meeting QF status.

Regarding NIMO's claim that it may declare the PPA null and void as against the FDIC, counsel for NIMO argues that the FDIC had notice of the decision to terminate the PPA by virtue of the complaint and the objection to the disclosure statement which were filed by NIMO. NIMO further argues that it is not actually terminating the PPA, but rather that it is declaring it null and void. The FDIC argues that they have a separate contract with NIMO regarding the Facility in the form of the Consent, and that under this document, the FDIC must receive notice in writing of NIMO's intent to terminate. The FDIC alleges that to date it has never received such notice. The FDIC further alleges that this notice would give them 180 days to cure any basis for an alleged default. According to the FDIC, the problem with NIMO's argument that it is declaring the PPA null and void, as opposed to simply terminating it, is that such a characterization effectively renders illusory NIMO's obligations under the Consent to give the FDIC written notice of an intent to terminate and an opportunity to cure any default, since the FDIC would never have an opportunity to cure a default if NIMO could declare the PPA null and void. The FDIC also disputes NIMO's claim that it concealed information regarding the Facility's problems, arguing that it had no duty to disclose such information and that it was never approached by NIMO for such information.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), made applicable to these proceedings by Fed.R.Bankr.P. 7056, provides that summary judgment shall be granted when there is no genuine issue as to any material fact and that the moving party is entitled, as a matter of law, to a judgment in its favor. *See* Fed.R.Civ.P. 56(c); *Federal Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). While summary judgment is recognized as a useful tool to expeditiously conclude litigation, *see Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980), it is also a drastic procedural weapon which serves to abrogate a party's right to present its case. *See Heyman v. Commerce and Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). Therefore, courts should grant summary judgment motions cautiously so that a litigant is not improperly denied a trial on the issues. *See G.W. White & Son v. Tripp (In re Tripp)*, 189 B.R. 29, 33-34 (Bankr. N.D.N.Y. 1995).

For purposes of a summary judgment motion, the burden is on the movant to show that no genuine issue as to any material fact exists. *See Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987); *Securities & Exchange Comm'n v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). In assessing the record to determine whether genuine issues of material fact are present, the trial court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *See LaFond v. General Physics Servs. Corp.*, 50 F.3d 165 (2d Cir. 1995). When presented with a motion for summary judgment, the trial court's task is carefully limited to "discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue resolution." *Gallo v. Prudential Residential*

Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994). If there is any evidence in the record from any source from which to draw a reasonable inference in favor of the non-moving party, summary judgment is improper. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

The disposition of a summary judgment motion is within the sound discretion of the trial court. *See United States v. Bachman,* 601 F.Supp. 1537, 1540 (E.D.Wis. 1985). The trial court may reserve judgment on the motion or deny it completely until all the evidence is presented and a more complete factual record is formed. *See id.* Therefore, even if a movant establishes the criteria for summary judgment, the motion can be denied as a matter of judicial discretion. *See Toyoshima Corp. v. General Footwear, Inc.*, 88 F.R.D. 559, 560 (S.D.N.Y. 1980).

After examination of the facts and arguments, the Court finds that none of the issues presented are ripe for summary judgment, and that the complexity of the issues raised demands a full plenary trial on the record. The Court was presented with similar motions for summary judgment by Debtor and the FDIC earlier in this adversary proceeding, and such relief was denied for the same reasons. The intervening decision by the FERC finding that the Facility was not a QF during the years 1991 through 1994 does not resolve the issues presented by the current motions for summary judgment. Therefore, the summary judgment motions of the parties are properly denied.

Based on the foregoing, it is hereby

ORDERED that the motion pursuant to Fed.R.Bankr.P. 7056 by Niagara-Mohawk Power Corporation seeking partial summary judgment against Megan-Racine Associates, Inc. and the Federal Deposit Insurance Corporation is hereby DENIED without prejudice; it is further

ORDERED that the motion pursuant to Fed.R.Bankr.P. 7056 by Megan-Racine Associates, Inc. seeking partial summary judgment against Niagara-Mohawk Power Corporation is hereby DENIED without prejudice; and it is further

ORDERED that the motion pursuant to Fed.R.Bankr.P. 7056 by the Federal Deposit Insurance Corporation seeking partial summary judgment against Niagara-Mohawk Power Corporation is hereby DENIED without prejudice.

Dated at Utica, New York

this 6th day of January 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge